



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**Surface Transportation Project Delivery Program; TxDOT Audit Report**

**[FHWA Docket No. FHWA-2016-0003]**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice, request for comment.

**SUMMARY:** The Surface Transportation Project Delivery Program (23 U.S.C. 327) allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. Prior to the Fixing America's Surface Transportation (FAST) Act of 2015, the program required semiannual audits during each of the first 2 years of State participation to ensure compliance by each State participating in the program. This notice announces and solicits comments on the second audit report for the Texas Department of Transportation's (TxDOT) participation in accordance to these pre-FAST Act requirements.

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590. You may also submit comments electronically at [www.regulations.gov](http://www.regulations.gov). All comments should include the docket number that appears in

the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

**FOR FURTHER INFORMATION CONTACT:** Dr. Owen Lindauer, Office of Project Development and Environmental Review, (202) 366-2655, [owen.lindauer@dot.gov](mailto:owen.lindauer@dot.gov), or Mr. Jomar Maldonado, Office of the Chief Counsel, (202) 366-1373, [jomar.maldonado@dot.gov](mailto:jomar.maldonado@dot.gov), Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

An electronic copy of this notice may be downloaded from the specific docket page at [www.regulations.gov](http://www.regulations.gov).

**Background**

The Surface Transportation Project Delivery Program (or NEPA Assignment Program) allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects. This provision has been codified at 23 U.S.C. 327. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The TxDOT published its application for assumption under the National Environmental Policy Act (NEPA) Assignment Program on March 14, 2014, at Texas Register 39(11): 1992, and made it available for public comment for 30 days. After considering public comments, TxDOT submitted its application to FHWA on May 29, 2014. The application served as the basis for developing the Memorandum of Understanding (MOU) that identifies the responsibilities and obligations TxDOT would assume. The FHWA published a notice of the draft of the MOU in the Federal Register on October 10, 2014, at 79 FR 61370 with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period FHWA and TxDOT considered comments and proceeded to execute the MOU. Since December 16, 2014, TxDOT has assumed FHWA's responsibilities under NEPA, and the responsibilities for the NEPA-related Federal environmental laws.

Prior to December 4, 2015, 23 U.S.C. 327(g) required the Secretary to conduct semiannual audits during each of the first 2 years of State participation, and annual audits during each subsequent year of State participation to ensure compliance by each State participating in the program. The results of each audit were required to be presented in the form of an audit report and be made available for public comment. On December 4,

2015, the President signed into law the FAST Act (Pub. L. 114-94, 129 Stat. 1312 (2015)). Section 1308 of the FAST Act amended the audit provisions by limiting the number of audits to one audit each year during the first 4 years of a State's participation. However, FHWA had already conducted the second audit for TxDOT's participation. This notice announces the availability of the report for second audit for TxDOT conducted prior to the FAST Act and solicits public comment on same.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C. 327; 49 CFR 1.48.

Issued on: March 18, 2016

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Gregory G. Nadeau

Administrator

Federal Highway Administration

## **DRAFT**

### **Surface Transportation Project Delivery Program**

### **FHWA Audit #2 of the Texas Department of Transportation**

**June 16, 2015 through December 16, 2015**

#### **Executive Summary**

This report summarizes the results of Audit #2 of the performance by the Texas Department of Transportation (TxDOT) regarding its assumption of responsibilities and obligations, as assigned by Federal Highway Administration (FHWA) under a memorandum of understanding (MOU) whose term began on December 16, 2014. From that date, TxDOT assumed FHWA National Environmental Policy Act (NEPA) responsibilities and liabilities for the environmental review and compliance for highway projects that require a Federal action in Texas (NEPA Assignment Program). The FHWA's role in the NEPA Assignment Program in Texas includes program review through audits, as specified in 23 U.S.C. 327 and in the MOU. The status of the Audit #1 observations (including any implemented corrective actions) is detailed at the end of this report.

The FHWA Audit #2 team (team) was formed in June 2015 and met regularly to prepare for the on-site portion of the audit. Prior to the on-site visit, the team: (1) performed reviews of TxDOT project file NEPA documentation in TxDOT's Environmental Compliance Oversight System (ECOS), (2) examined the TxDOT pre-Audit #2

information request responses, and (3) developed interview questions. The on-site portion of this audit, comprised of TxDOT and other agency interviews, was conducted September 8-9, 2015, and September 20-25, 2015.

The TxDOT continues to make progress developing, revising, and implementing procedures and processes required to implement the NEPA Assignment Program. Overall, the team found evidence that TxDOT is committed to establishing a successful program. This report summarizes the team's assessment of the current status of several aspects of the NEPA Assignment Program, including successful practices and 17 total observations that represent opportunities for TxDOT to improve its program. The team identified three non-compliance observations that TxDOT will need to address as corrective actions in its next self-assessment and subsequent report.

While TxDOT has continued to make progress toward meeting all the responsibilities it has assumed in accordance with the MOU, the recurring non-compliance observations require TxDOT corrective action. By taking corrective action and considering changes based on the observations in this report, TxDOT will continue to move the program toward success.

## **Background**

The Surface Transportation Project Delivery Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal

highway projects. This program is codified at 23 U.S.C. 327. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the obligations it has assumed, in lieu of FHWA.

The State of Texas was assigned the responsibility for making project NEPA and other related environmental decisions for highway projects on December 16, 2014. In enacting Texas Transportation Code, §201.6035, the State has waived its sovereign immunity under the 11th Amendment of the U.S. Constitution and consents to defend any actions brought by its citizens for NEPA decisions it has made in Federal court.

The FHWA responsibilities assigned to TxDOT are varied and tied to project level decisionmaking. These laws include, but are not limited to, the Endangered Species Act (ESA), Section 7 consultations with the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration National Marine Fisheries Service, and Section 106 consultations regarding impacts to historic properties. Two Federal responsibilities were not assigned to TxDOT and remain with FHWA: (1) making project-level conformity determinations under the Federal Clean Air Act and (2) conducting government-to-government consultation with federally recognized Indian tribes.

Prior to December 4, 2015, FHWA was required to conduct semiannual audits during each of the first 2 years of State participation in the program and audits annually for 2

subsequent years as part of FHWA's oversight responsibility for the NEPA Assignment Program. The reviews assess a State's compliance with the provisions of the MOU and all applicable Federal laws and policies. They also are used to evaluate a State's progress toward achieving its performance measures as specified in the MOU; to evaluate the success of the NEPA Assignment Program; and to inform the administration of the NEPA Assignment Program. On December 4, 2015, the President signed into law the Fixing America's Surface Transportation (FAST) Act of 2015, which amended the audit provisions of the program by changing the frequency to one audit per year during the first 4 years of the State's participation. However, this audit was conducted prior to the passage of the FAST Act, and this report is being prepared and made available under the audit provisions as they existed prior to the passage of the FAST Act. This report summarizes the results of the second audit, and updates the reader on the status or corrective actions for the results of the first audit.

### **Scope and methodology**

The overall scope of this audit review is defined both in statute (23 U.S.C. 327) and the MOU (Part 11). An audit generally is defined as an official and careful examination and verification of accounts and records, especially of financial accounts, by an independent unbiased body. With regard to accounts or financial records, audits may follow a prescribed process or methodology, and be conducted by "auditors" who have special training in those processes or methods. The FHWA considers this review to meet the definition of an audit because it is an unbiased, independent, official, and careful

examination and verification of records and information about TxDOT's assumption of environmental responsibilities. The team that conducted this audit has completed special training in audit processes and methods.

The diverse composition of the team, the process of developing the review report, and publishing it in the Federal Register help maintain an unbiased audit and establish the audit as an official action taken by FHWA. The team for Audit #2 included NEPA subject matter experts from the FHWA Texas Division Office and FHWA offices in Washington, DC, Atlanta, GA, Columbus, OH, and Salt Lake City, UT. In addition to the NEPA experts, the team included an FHWA Professional Development Program trainee from the Texas Division office and one individual from FHWA's Program Management Improvement Team who provided technical assistance in conducting reviews.

Audits, as stated in the MOU (Parts 11.1.1 and 11.1.5), are the primary mechanism used by FHWA to oversee TxDOT's compliance with the MOU, ensure compliance with applicable Federal laws and policies, evaluate TxDOT's progress toward achieving the performance measures identified in the MOU (Part 10.2), and collect information needed for the Secretary's annual report to Congress. These audits also must be designed and conducted to evaluate TxDOT's technical competency and organizational capacity, adequacy of the financial resources committed by TxDOT to administer the responsibilities assumed, quality assurance/quality control (QA/QC) process, attainment

of performance measures, compliance with the MOU requirements, and compliance with applicable laws and policies in administering the responsibilities assumed. The four performance measures identified in the MOU are: (1) compliance with NEPA and other Federal environmental statutes and regulations, (2) quality control and QA for NEPA decisions, (3) relationships with agencies and the general public, and (4) increased efficiency, timeliness, and completion of the NEPA process.

The scope of this audit included reviewing the processes and procedures used by TxDOT to reach and document project decisions. The team conducted a careful examination of highway project files and verified information on the TxDOT NEPA Assignment Program through inspection of other records and through interviews of TxDOT and other staff. The team gathered information that served as the basis for this audit from three primary sources: (1) TxDOT's response to a pre-Audit #2 information request, (2) a review of a random sample of project files with approval dates subsequent to the execution of the MOU, and (3) interviews with TxDOT, the U.S. Army Corps of Engineers (USACE), and the U.S. Coast Guard (USCG) staff. The TxDOT provided information in response to FHWA questions and requests for all relevant reference material. That material covered the following six topics: (1) program management, (2) documentation and records management, (3) QA/QC, (4) legal sufficiency review, (5) performance measurement, and (6) training. The team subdivided into working groups that focused on each of the six topics.

The intent of the review was to check that TxDOT has the proper procedures in place to implement the MOU responsibilities assumed, ensure that the staff is aware of those procedures, and that staff implement the procedures appropriately to achieve NEPA compliance. The review is not intended to evaluate project-specific decisions, or to second guess those decisions, as these decisions are the sole responsibility of TxDOT.

The team defined the timeframe for highway project environmental approvals subject to this second audit to be between March 2015 and June 2015. The focus on the second review included the 3 to 4 months after FHWA's audit #1 highway project file review concluded. The second audit intended to: (1) evaluate whether TxDOT's NEPA decisionmaking and other actions comply with all the responsibilities it assumed in the MOU, and (2) determine the current status of observations in the Audit #1 report and required corrective actions (see summary at end of this report). The team established a population of 598 projects subject to review based on lists of NEPA approvals (certified compliant by TxDOT as required in MOU Part 8.7.1) reported monthly by TxDOT. The NEPA approvals included categorical exclusion (CE) determinations, 47 other types of environmental approvals including approvals to circulate an environmental assessment (EA), findings of no significant impacts (FONSI), re-evaluations of EAs, Section 4(f) decisions, approvals of a draft environmental impact statement (EIS), and a record of decision (ROD). In order to attain a sample with a 95 percent confidence interval, the team randomly selected 83 CE projects. In addition, the team reviewed project files for

all 47 approvals that were not CEs. The sample reviewed by the team was 130 approval actions.

The interviews conducted by the team focused on TxDOT's leadership and staff at Environmental Affairs Division (ENV) Headquarters in Austin and nine TxDOT Districts. To complete the interviews of District staff, the team divided into three groups of four to conduct face-to-face interviews at TxDOT Districts in Dallas, Paris, Tyler, Lubbock, Childress, Amarillo, Houston, Beaumont, and Bryan. With these interviews completed, FHWA has interviewed staff from 60 percent (15 of 25) of the TxDOT District offices. The FHWA anticipates interviewing staff from the remaining TxDOT District offices over the next year.

### **Overall Audit Opinion**

The team recognizes that TxDOT is still implementing changes to address and improve its NEPA Assignment Program and that its programs, policies, and procedures may need revision. The TxDOT's efforts are appropriately focused on establishing and refining policies and procedures (especially in regards to the non-compliance observations made by FHWA), training staff, assigning and clarifying changed roles and responsibilities, and monitoring its compliance with assumed responsibilities. The team has determined that TxDOT continues to make reasonable progress despite some noted delays (pending ECOS upgrades) as the program matures beyond the start-up phase of NEPA Assignment operations. In addition, the team believes TxDOT is committed to establishing a

successful program. The team's analysis of project file documentation and interview information identified several non-compliance observations, and several other observations including evidence of good practice. One non-compliance observation is recurrent from Audit#1, relating to "conditional clearances," that appears to reflect a misunderstanding on the part of TxDOT on when and whether information at hand is sufficient to support a NEPA decision that complies with the requirements of the MOU. This is a point of concern for FHWA and if necessary, this issue will be a focus of future audits.

The TxDOT staff and management have engaged FHWA and have received constructive feedback from the team to revise TxDOT's standard operating procedures. By considering and acting upon the observations contained in this report, TxDOT should continue to improve upon carrying out its assigned responsibilities and ensure the success of its NEPA Assignment Program.

### **Non-Compliance Observations**

#### **AUDIT #2**

Non-compliance observations are instances where the team found the State was out of compliance or deficient with regard to a Federal regulation, statute, guidance, policy, or the terms of the MOU (including State procedures for compliance with the NEPA process). Such observations may also include instances where the State has failed to maintain adequate personnel and/or financial resources to carry out the responsibilities

assumed. Other observations that suggest a persistent failure to adequately consult, coordinate, or take into account the concerns of other Federal, State, tribal, or local agencies with oversight, consultation, or coordination responsibilities could be non-compliant. The FHWA expects TxDOT to develop and implement corrective actions to address all non-compliance observations as soon as possible. The TxDOT has already informed the team it is implementing some recommendations made by FHWA to address non-compliance and other observations. The FHWA will conduct follow up reviews of the non-compliance observations as part of Audit #3, and if necessary, future audits.

The MOU (Part 3.1.1) states “pursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and TxDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary’s responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C. 139, 40 CFR parts 1500-1508, DOT Order 5610.1C, and 23 CFR part 771 as applicable.” Also, the performance measure in MOU Part 10.2.1(A) for compliance with NEPA and other Federal environmental statutes and regulations commits TxDOT to maintaining *documented compliance* with requirements of all applicable statutes, regulations, procedures, and processes set forth in the MOU. The following non-compliance observations were found by the team based on documentation (or lack thereof) in project files and other documentation.

### Audit #2 Non-Compliance Observation #1

Non-compliance Observation #1 is an instance (1 out of 130 actions reviewed) where TxDOT made a CE determination for a project before all regulatory criteria for CE determination were met. The TxDOT followed a State procedure relating to the NEPA approval subject to “conditional clearances” that allowed the project to proceed to construction. Audit #1 Non-compliance Observation #2 also was an instance where a CE determination was made by TxDOT staff before all environmental requirements had been satisfied (i.e., project level air quality conformity and listing in the Statewide Transportation Improvement Program (STIP)) following the same TxDOT procedure. Discovery of this second instance of non-compliance tied to conditional clearance approvals triggered additional requests for information by the team and gathering information through informal interviews.

The Non-compliance Observation was that an ECOS project record showed that a TxDOT decisionmaker made a CE determination decision before the consultation for the project was completed. The completion of the consultation would have confirmed that a required constraint for the CE was met. This instance involved the determination of whether a project qualified for CE (c)(26). The FHWA’s regulation at 23 CFR 771.117(c)(26) restricts the use of the CE to projects that meet all the constraints in 23 CFR 771.117(e). The constraint in 23 CFR 771.117(e)(3) prohibits the use of the CE if it involves a finding of “adverse effect” to a historic property or the use of a resource

protected under Section 4(f), except for actions resulting in de minimis impacts. The ECOS record shows that at the time of the CE determination, these impacts were presumed, but consultation was not yet initiated in writing nor documented as completed such that the application of that CE could be justified. Later in time, after the CE determination was used to allow the project to proceed to a point where TxDOT made a request to FHWA to proceed to construction with Federal funding, the project record contained Texas Historical Commission (THC) concurrence that the effect was not adverse, and that a de minimis impact determination was supported. The TxDOT should not have applied a CE to a project before confirming that all conditions and constraints for use of that CE were met. By proceeding in this manner, TxDOT has not complied with the requirements for use of that CE, as specified in regulation. Also, the actions taken by TxDOT that lead to the "conditional clearance" do not comply with FHWA's Section 4(f) regulation, 23 CFR 774, where the CE determination was made when outcome of the Section 4(f) impact was not determined.

At the team's request for additional information on projects processed with "conditional clearances," TxDOT provided a list of 18 projects that included the non-compliant project identified in Audit #1 and described above. Eight project files showed documentation that a CE determination was made before the period for tribal consultation was complete. The TxDOT, FHWA, and Indian Tribes with an interest in Texas have executed programmatic agreements that define for which projects TxDOT would consult and manner of consultation. Those agreements commit TxDOT to send information to a

Tribe and allow for a 30-day period for the Tribe to respond. If the Tribe does not respond after the 30 days, TxDOT may proceed to the next step of the process. These agreements commit TxDOT and FHWA to a manner of consultation that was not followed for eight projects. The TxDOT's assumption of FHWA's NEPA responsibilities does not permit TxDOT to disregard commitments it has made (along with FHWA) to complete tribal consultation before moving to the next step (making a CE determination). These actions are a violation of MOU Part 5.1.1 where TxDOT is subject to the same procedural and substantive requirements in interagency agreements such as programmatic agreements. Additionally, TxDOT's completion of NEPA decisionmaking prior to completing tribal consultation violates MOU Part 7.2.1 where TxDOT has committed to ensure that it has processes and procedures in place that provide for proactive and timely consultation to carry out responsibilities assumed under the MOU.

The TxDOT has a Standard Operating Procedure (SOP) for issuing a Letter of Authority (LOA) dated April 1, 2015, that enables the project to proceed to the next step in project development after a decisionmaker has made a NEPA decision based on incomplete information. Issuance of a LOA allows a project to proceed to the bidding process. For the 18 projects in the list provided, TxDOT certified to FHWA that the project's NEPA requirements were satisfied. The TxDOT has noted in the project record that the project was "conditionally cleared" for letting. Upon review, the team identified 11 projects of the 18 reviewed that did violate MOU Part 8.7.1 because the NEPA certification included projects that either did not conform to required conditions to apply CEs or did not

complete required consultation requirements. Also, TxDOT's SOP for issuing a LOA does not comply with MOU Part 5.2.1 in that TxDOT's procedures did not result in compliance with Federal regulations. The remaining seven projects on the list of 18 "conditional clearance" projects advanced by TxDOT did not indicate an instance of an unjustified NEPA approval, but rather were for actions that occurred post-NEPA approval (e.g., 404 permit issuance, Interstate Access Justification and right-of-way (ROW) purchase).

As a result, FHWA has asked that TxDOT immediately refrain from issuing LOAs based on "conditional clearances." The TxDOT has begun the process of revising the subject SOP. The FHWA will review the SOP to ensure that it satisfactorily complies with FHWA policy and the MOU. In addition, FHWA has requested that TxDOT report any projects that use the revised SOP to FHWA in advance of FHWA project authorization until further notice.

#### Audit #2 Non-Compliance Observation #2

Two projects reviewed by the team were in error regarding NEPA decision reporting. The MOU Part 8.2.6 requires the listing of any approvals and decisions made. One CE determination was reported to FHWA as an action that would utilize less than \$5 million of Federal funds (CE (c)(23)) where the project file listed the CE determination for an action that would take place entirely within the existing operational ROW (CE (c)(22)). A second project was correctly reported on the monthly list, but a review of the

project file lacked documentation for this determination. Even though these may result from data entry errors, TxDOT should make every effort to ensure the decisions it reports monthly are accurate and project files are complete.

### Audit #2 Non-Compliance Observation #3

Twelve project file records were missing information that appeared to be out of compliance with TxDOT's procedures or documentation policy. One project's CE Determination Form did not identify the approver's title. Another project file lacked the Public Involvement summary. Nine project files lacked records, or included forms that lacked signatures where TxDOT procedures indicated that signatures were required. These included signatures on a Biological Evaluation form, Project Coordination Request form, and a Public Hearing Certification. One project file where a public involvement event lacked documentation on what was presented. The implication of the TxDOT procedure is that the signature or information on the form is part of the review and approval of the report or form. Project files with missing information may suggest that a NEPA decision was based on incomplete or ambiguous information. The TxDOT has informed FHWA that it will review the files for these projects and take corrective action.

### **Observations and Successful Practices**

This section summarizes the team's observations about issues or practices that TxDOT may want to consider as areas to improve and practices the team believes are successful that TxDOT may want to continue or expand in some manner. Further information on

these observations and practices is contained in the following subsections that address the six topic areas identified in FHWA's team charter and work plan to perform this audit.

Throughout the following subsections, the team lists 14 remaining observations that FHWA urges TxDOT to act upon in order to make improvements. The FHWA's suggested methods of action include: corrective action, targeted training, revising procedures, continued self-assessment, or some other means. The team acknowledges that, by sharing this draft audit report with TxDOT, TxDOT has the opportunity to begin the process of implementing actions to address the observations to improve its program prior to the publication of this report. The FHWA will consider the status of these observations as part of the scope of Audit #3. The team will also include a summary discussion that describes progress since the last audit in the Audit #3 report.

### **1. Program Management**

The team recognized four successful program management practices. First, it was evident through interviews that TxDOT has employed many highly qualified staff for its program. Second, the team saw evidence of strong communication between TxDOT's ENV and District staff with regard to explaining roles and responsibilities associated with implementation of the MOU for NEPA Assignment. Third, based on the response to the pre-Audit #2 information request and interview questions, the team recognized TxDOT ENV's efforts to develop and update procedures, guidance, and tools as necessary or required to assist Districts in meeting requirements of the MOU. Finally, District staff

understands and takes pride in and ownership of their CE determinations. The ENV likewise takes pride in the responsibility for EA and EIS decisionmaking and oversight for the NEPA Assignment Program.

In addition, the team found evidence of six successful program management practices through information provided by TxDOT and through interviews. The team recognizes the TxDOT project Core Team concept, which provides joint ENV and District peer reviews for EAs and EISs as a good example of TxDOT utilizing its existing staff to analyze NEPA documents and correct compliance issues on higher level of NEPA documentation and procedures before project approval. Many Districts appreciate the efforts of and results from the project Core Team and credit them for assuring their projects are compliant.

The “NEPA Chat” continues to be a notable example of TxDOT’s effort to achieve a compliant NEPA Assignment Program with enhanced communication among TxDOT environmental staff statewide. The NEPA Chat, led by ENV, provides a platform for complex issues to be discussed openly, and for Districts to learn about statewide NEPA Assignment Program issues, and new policies and procedures. To date, the NEPA Chat has proven to be an effective vehicle to disseminate relevant NEPA information quickly and selectively to the TxDOT District Environmental Coordinators.

Also, based on interviews and the response to the pre-audit information request, almost all of the ENV and District staff feel there is sufficient staff to deliver a successful NEPA Assignment Program at the ENV and District level. This is further supported by ENV's willingness to shift responsibilities to better align with the needs of the NEPA Assignment Program. After interviewing the various Districts, they indicated that ENV is available to assist the Districts whenever they need help.

The ENV Self-Assessment Branch (SAB) fosters regular and productive communication with District staff after environmental decisions are made. The SAB staff prepares and transmits a summary of the results of their reviews of project documentation, both positive and negative, and follows up with the District Environmental Coordinator responsible for the project via telephone. They provided this feedback within 2 weeks of their review, which resulted in early awareness of issues and corrective action, where necessary, and positive feedback.

The refinement of the pilot "Risk Assessment" tool (a "smart pdf form") for environmental documents is a successful, but optional, procedure that may become part of ECOS during the scheduled upgrades. Based on the team's interviews, when District staff use the form, they are better able to understand the resources to be considered, what resources should receive further analysis, and the resulting output serves as documentation for District decisions. Even though this tool is not yet currently integrated within ECOS, it can be uploaded when used.

The TxDOT noted that it had recently developed a QA/QC Procedures for Environmental Documents Handbook (March 2015), and it is used by the project Core Team to develop EA and EIS documents. Through TxDOT's response to pre-Audit #2 questions and through interviews with various staff, TxDOT has continued to demonstrate that it has provided a good base of tools, guidance, and procedures with associated and timely updates to assist in meeting the terms of the MOU and still takes pride in exercising its assumed responsibilities.

The team considers three observations sufficiently important to note below. The FHWA urges TxDOT to consider ongoing and/or additional improvements or corrective actions to project management in its NEPA Assignment Program to address these observations.

#### AUDIT #2 Observations

##### Audit #2 Observation #1

Based on interviews with the USACE and USCG, FHWA would like to draw TxDOT's attention to several items. The team found that USCG had multiple ENV and District points of contact and preferred to deal with only one ENV point of contact at TxDOT. A single point of contact was the practice prior to the NEPA Assignment Program when issues needed to be elevated. The TxDOT has indicated that it identified a point of contact for USCG in August of this year, but will follow up in writing. The USACE noted that with the final rule the USACE opinion may change with regard to how it

conducts its own regulatory process. This may prove to be problematic for applicants like TxDOT. Furthermore, interviews with TxDOT staff noted that the relationship with THC may warrant additional attention due to changes in the coordination process for a Section 404 nationwide permit and preconstruction notification for Federal projects. Generally, it is important for TxDOT to maintain and strengthen relationships with Federal agencies including the State Historic Preservation Officer that processes Section 106 actions. This may be considered critical under NEPA Assignment as TxDOT is acting as a Federal agency.

#### Audit #2 Observation #2

The team found in a legacy project (i.e., a project that began with FHWA as the lead agency and was transferred to be TxDOT-led after NEPA Program Assignment) that an ESA “no effect” determination was made by TxDOT to support a FONSI. Previously, when acting as the lead agency, FHWA had requested that TxDOT resolve issues identified in the USFWS correspondence for the project. In this instance, the project record initially reflects a “may affect” determination by FHWA that later changed to a “no effect” determination by TxDOT. The team was unable to find documentation in the project file to justify why such a change occurred. The team is currently working with TxDOT to review the process by which TxDOT makes “no effect” determinations for ESA. If concerns remain after this collaboration, FHWA may invite our USFWS liaison to review this issue in more depth as part of Audit #3.

### Audit #2 Observation #3

One project file contained information about an 8-mile detour categorized as not a “major traffic disruption.” An interviewee at a different District identified what they considered a different standard (i.e., 2-mile detour) for a “major traffic disruption.” These observations suggest TxDOT’s approach to defining 23 CFR 771.117(e)(4) for major traffic disruption may be inconsistent. The FHWA recognizes that the context of when a disruption is considered to be “major” is important and may depend on local conditions. The FHWA urges TxDOT to develop guidance and a set of examples for rural, urban, and metropolitan Districts to align when major traffic disruption occurs.

## **2. Documentation and Records Management**

The team relied on information in ECOS, TxDOT’s official file of record, to evaluate project documentation and records management. The ECOS is a tool for information records, management, and disclosure within TxDOT District Offices, between Districts and ENV, and between TxDOT and the public. The strength of ECOS is its potential for adaptability and flexibility. The challenge for TxDOT is to maintain and update the ECOS operating protocols (for consistency of use and document/data location) and to educate its users on updates in a timely manner.

### **Successful Practices**

A number of best practices demonstrated by TxDOT were evident as a result of the documentation and records management review. The ECOS has demonstrated system-

wide improvements in usage by Districts since Audit #1, most notably in the areas of download speed and interface. The ECOS has improved in areas of connectivity and speed, and technical support for ECOS is rated as being very high and responsive. The team recognizes the need for continuous update and maintenance for the ECOS system and ENV's upcoming plans for additional NEPA compliance and documentation related improvements in five phases. The team also recognized that TxDOT Districts are making good use of the Project Risk Assessment Forms to Develop Project Scope and help guide the environmental process.

Based on examination of the 130 sample files reviewed, the team identified five general observations that are mostly issues where record keeping and documentation could be improved or clarified. The team used a documentation checklist to verify the presence of information required by regulation and review the files of the 130 sampled projects.

#### Audit #2 Observation #4

One project shows a NEPA clearance date that occurs after the LOA clearance date. The TxDOT has indicated that this was a data entry error that was preserved "in order to understand the progression of project development." The NEPA clearance must occur before a date of LOA clearance according to TxDOT process.

During the interviews, the team learned that ECOS files may be deleted by their author and leave no trace of that deletion in ECOS. In addition, the team learned through

interviews that deleted files may not be recovered. The FHWA is concerned and urges TxDOT to consider that if decisional information can be deleted, especially if the deletion occurs after the NEPA decision document is signed, the project record would not support the decisions made.

#### Audit #2 Observation #5

The team reviewed files for one project where the NEPA decision may be an example of a potential inconsistency in NEPA document content for a single project. The scope in the EA document described both a road widening with bridge replacement and widening without bridge replacement. The FONSI document project scope was described as roadway widening, the file documentation was unclear as to the status of the intent to replace the bridge. The team urges TxDOT to carefully compare the project description in an EA and any resulting FONSI and to explain in the FONSI any project description changes from the EA.

The team found there were 15 out of 83 project files where criteria for a specific CE category remained either undocumented or unclear for certain CEs (c(26)-(28)).

Examples included a project that may not conform to 23 CFR 771.117(e)(4) due to major traffic disruption, a c(22) operational ROW project stated both “rehab lanes” and “widen lanes,” and c(23) projects not to exceed \$5 million in Federal funds.

#### Audit #2 Observation #6

The FHWA is generally interested in how TxDOT fulfills its environmental commitments, which TxDOT records through an Environmental Permits, Issues and Commitments (EPIC) sheet. Such sheets become part of both the project record and often, the project bid package. In reviewing project files, the ECOS commitment tab defaults to the following note “No EPICs exist for this project” while the same file contained uploaded EPIC sheets in the ECOS documentation tab. Since the EPIC sheet is the way TxDOT implements its environmental commitments, the team would like to draw TxDOT’s attention to occasional contradictory information on EPICs in its project files. The team acknowledges that TxDOT has recognized this issue and created a joint District and ENV team to address this issue to address this problem.

#### Audit #2 Observation #7

The team found two examples of a single project that had multiple CE approvals. Each decision document had a different approval date, however the project was unchanged. The approval documents (with different dates) otherwise appeared to be identical, with the exception of minor editorial changes, such as adding a position title or utilizing an updated form. After interviews with SAB staff, the team learned that this practice was used to correct editorial mistakes or when new forms were released. The team could not determine the appropriate NEPA approval date. If a decision document (CE, FONSI, or ROD) needs to be revisited, FHWA regulations require a re-evaluation. A re-evaluation does not create a new NEPA approval date, it just analyzes if the original decision

remains valid in light of the new information. The TxDOT might clarify its project files by including a journal entry in ECOS to explain the correction of errors on forms.

#### Audit #2 Observation #8

One type of decision reviewed by the team was a sequence of re-evaluations on the same project change that occurred after a NEPA approval has been made. The team found one project that had three partial re-evaluations in succession for the same design change (a sidewalk relocation) for adjacent parcels and a construction easement in each separate re-evaluation consultation checklist. The TxDOT indicated in its comment on this observation that the project was proceeding under a design-build contract that led to a number of changes. The FHWA is concerned that this TxDOT activity could possibly lead to segmenting the review of new impacts if this practice were to continue.

#### Audit #2 Observation #9

In general the team views the continuing delay in implementing needed substantive ECOS upgrades (i.e., outdated CE terminology and EPIC documentation contradiction, since CE MOU approval on February 12, 2014) and the current schedule to implement upgrades over 5 years to be too long a timeframe as recurring errors may result. The team urges TxDOT to implement the upgrades with the timeframe of FHWA audits, as it has continued to make recurring observations on project recordkeeping during audits.

### **3. Quality Assurance/Quality Control**

The team considers the QA/QC program to be generally in compliance with the provisions of TxDOT's QA/QC Plan. The team was pleased to see that many of the positive items mentioned and observed in Audit #1 appear to be continuing to occur.

### **Successful Practices**

The team observed four areas of successful practices currently in place that align with TxDOT's QA/QC Control Procedures for Environmental Documents. First, during the team site visits to the TxDOT Districts it learned that one District (Houston) has one person dedicated to reviewing the NEPA documents in order to review documentation for quality and completeness (QC as it occurs before the decision is made), and heard in an interview from another District (Dallas) they are planning to do the same.

Second, the team learned that the Core Team concept (QC) appears to be working and is well received by the District offices visited during the audit. The opportunity of District Environmental Coordinators to work with an ENV person early in the process to identify potential issues should result in efficient document preparation, an expectation of a quality document, complete project file, and improved project delivery.

Third, the team received a lot of positive comments from the Districts visited regarding the SAB of TxDOT. The District staffs stated that the SAB feedback (QA that occurs after the decision is made) was quick and resulted in a great training tool to improve documentation on future projects. The team urges TxDOT to continue this practice and

encourages TxDOT to consider more focused and timely input at the pre-decision stage of project development process during QC. It is possible that the non-compliance observations cited in this report could have been identified and corrected if an enhanced pre-decisional (QC) process related check were implemented.

Fourth, since the beginning of 2015, TxDOT has created over 31 tool kits, guidance, forms, handbooks, and procedures to improve consistency and compliance of its NEPA documents and decisions. Feedback during interviews indicated that the TxDOT staff appreciated the effort from ENV to create user friendly forms and procedures to ensure compliance and reduce errors in their documentation.

As a result of the team's file reviews and interviews, it considers three observations as sufficiently important to urge TxDOT to consider improvements or corrective actions in its approach to QA/QC.

#### Audit #2 Observation #10

During the audit file reviews, the team occasionally found difficulty locating information in project files and could not determine whether environmental requirements were addressed but not documented. Based on what the team found in ECOS records, TxDOT appears to lack a statewide standard or guidance on ECOS naming conventions or ECOS file management. The FHWA reviewers found file names that were not intuitive for conducting efficient or comprehensive reviews. During interviews with the Districts visited, TxDOT staff at times also had trouble locating information in ECOS and was

uncertain of the details of projects when questioned. This lack of consistency statewide is an issue that TxDOT acknowledged in a closeout meeting with the team and stated that it was working toward resolving the issue internally. The team will continue to monitor this issue in Audit #3.

#### Audit #2 Observation #11

Based on the recurring non-compliance observations from Audits #1 and #2, the team urges TxDOT to focus effort on its QA/QC actions. In a few instances, the team found documentation in the project files that was the result of QC, especially when a form was in error and had to be redone. But generally, the team found no entries in project files that showed projects had been reviewed for QC. The team could not determine for the project files reviewed for this audit whether TxDOT's actions effectively implemented QA/QC actions that were agreed to in MOU Part 8.2.4. The FHWA will focus efforts in Audit #3 on how TxDOT applies QC and implementing QA strategies to individual projects.

#### **4. Legal Sufficiency Review**

From interviews the team learned there are two attorneys in TxDOT's Office of General Counsel (OGC) who provide legal services on environmental issues. The OGC has an ongoing process to fill the third environmental attorney position in OGC. In addition, OGC has had an outside contract attorney providing legal assistance on environmental issues for a number of years. The OGC recently completed its biannual procurement of

outside legal services for environmental issues, and has now obtained legal services from a total of three law firms. Legal counsel (both OGC staff and outside counsel) are primarily dedicated to serve as a resource providing legal assistance in project development, review of environment documents, and legal sufficiency reviews.

Assistance from OGC (who assisted in developing the sections) is guided by ENVs Project Delivery Manual Sections 303.080 through 303.086. These sections provide guidance on requesting legal sufficiency, legal sufficiency review of FHWA projects, and review of publishing a Notice of Intent (NOI) to prepare an EIS and Notice of Availability in the Federal Register. Per the guidance, legal sufficiency is required prior to approval of:

- 1) NOI to prepare an EIS
- 2) Final Environmental Impact Statement (FEIS)
- 3) Individual 4(f) Statement (programmatic or de minimis 4(f) evaluations do not require legal sufficiency review)
- 4) Notice that a permit, license, or approval is final under 34 U.S.C. 139(1).

The OGC is available as a resource to ENV and the Districts to answer questions on NEPA issues and specific questions on projects. Requests for assistance are made through ENV and the vehicle for communication is primarily e-mail. The guidance states that communications between OGC and ENV for the purpose of rendering legal services or advice are protected by the attorney-client privilege.

Based on a report provided by OGC, since January 1, 2015, it has reviewed or has been involved in providing legal review for 15 project actions. These included five 139(l) notices, an FEIS/ROD, three RODs, one NOI, an EA, a public hearing and response report, an FEIS, and an FEIS errata sheet. The OGC provided legal sufficiency reviews for all 139(l) reviews, the FEIS errata sheet, and the FEIS.

Currently, ENV project managers request the review of documents and/or materials by OGC. The lead attorney in OGC assigns the project to staff based on workload and issues. He works with the project managers to agree upon an acceptable review timeframe. Per OGC, reviews are only done after the technical reports have been reviewed and approved by ENV. Comments from the attorney are provided in the usual comment/response matrix to ENV, which incorporates them into the overall comment/response matrix that is sent to the project Core Team to address. Once any comments are adequately addressed, the attorney will issue a legal sufficiency statement. The OGC does not maintain a separate project file as it completes review of a project.

In reviewing the document for legal sufficiency the OGC attorneys rely on Federal regulations and guidance, TxDOT toolkits and manuals, and discussions with project delivery managers. The OGC relies on the subject matter experts to ensure the technical reports are adequate, and only does an in-depth review of a technical report if warranted. In general, the attorneys are looking for consistent, well written documents that are reader friendly and clearly document the NEPA decision. After reviewing the document, there

is a consultation between the lead attorney and staff attorney concerning the review results before a legal sufficiency finding is issued. Copies of emails providing comments on Federal and State register notices, the legal sufficiency reviews of several Section 139(l) notices, and an FEIS were provided to the team.

The lead attorney for OGC has 11 years of transportation experience with TxDOT but until NEPA assignment process began, only limited NEPA experience. The other OGC attorney's NEPA experience also began with the NEPA Assignment process. The contract attorney has had approximately 12 years of experience working NEPA issues and lawsuits in Texas. The OGC may hire outside law firms to provide assistance on an as-needed basis. All such firms have extensive transportation and NEPA experience.

The OGC indicated that there has been some early involvement in project familiarization and information gathering so that it is aware of potential issues, impacts, and timeframes during project initiation and scoping. The OGC is making a concerted effort also to attend public hearings and other project meetings as the project development process progresses. The OGC wants to be considered a resource for the ENV and TxDOT Districts from early on in project development as opposed to only being contacted when there are major issues.

Based on the team interviews and review of documentation, the requirements for legal sufficiency under the MOU are being adequately fulfilled. In FHWA's experience, legal

staff can expand their role by inserting themselves into the project development process and promoting their availability as a resource to TxDOT staff.

#### Audit #2 Observation #12

Neither in the project delivery manual nor elsewhere does OGC provide an expectation for the time frame necessary for a legal review. The team urges TxDOT to establish a review time frame for legal sufficiency, develop some education and outreach to the TxDOT Districts regarding the OGC role, especially as a resource, and suggested additions to the legal sufficiency documentation.

### **5. Performance Measurement**

Part 10 of the MOU identifies performance measures to be reported by TxDOT that FHWA would consider in conducting audits. The FHWA did not independently verify the measures reported by TxDOT. The TxDOT's first Self-Assessment Summary Report (since implementing NEPA Assignment) discusses progress made toward meeting the four performance measures. These measures provide an overall indication of TxDOT's discharge of its MOU responsibilities. In addition, in collecting data related to the reporting on the performance measures, TxDOT monitors its overall progress in meeting the targets of those measures and includes this data in self-assessments provided under the MOU (Part 8.2.5). The four performance measures are: (1) compliance with NEPA and other Federal environmental statutes and regulations, (2) QA/QC for NEPA

decisions, (3) relationships with agencies and the general public, and (4) increased efficiency and timeliness in completion of the NEPA process.

The TxDOT reports three measures of compliance with NEPA and other Federal laws and regulations: (1) percent of complete NEPA Assignment Program Compliance Review Reports submitted to FHWA on schedule, (2) percent of identified corrective actions that are implemented, and (3) percent of final environmental documents that contain evidence of compliance with requirements of Section 7, Section 106, and Section 4(f). The measured results range between 97 percent and 100 percent complete.

The TxDOT considered QA/QC for NEPA decisions with three measures: (1) percent of FEISs and individual Section 4(f) determinations with legal sufficiency determinations that pre-date environment document approval, (2) percent of EAs and EISs with completed environmental review checklists in the file, and (3) percent of sampled environmental project files determined to be complete and adequate for each self-assessment period. These measured results range between 94.3 percent and 100 percent.

The TxDOT is still in the process of assessing its measure of relationships with agencies and the general public. Since the completion of Audit #1, TxDOT has prepared and distributed a survey to agencies it interacts with as part of NEPA. The survey asked agency staff to respond to TxDOT's capabilities, responsiveness, efficiency, communications, and quality. The TxDOT proposes to poll agencies each year and

report comparisons in future self-assessments. The TxDOT's measure of its relationship with the public is to compare the number of complaints received year to year. The TxDOT reports no complaints from the public received since assuming NEPA Assignment. A second measure for public relationship is the percent of signed final EA or EIS projects where a public meeting or hearing was conducted and the associated documentation was in the file. The TX DOT reports a measure of 92.3 percent because one EA file had a missing signed public hearing certification page. A third measure of relationships considered by TxDOT is the time between beginning a formal conflict resolution process and the date of resolution. The TxDOT reports there was no conflict resolution process initiated during the team's review period.

The TxDOT provided its initial measures of increased efficiency and timeliness in completion of the NEPA process in the Self-Assessment Summary Report. Its first of three measures is to compare the median time to complete CEs, EAs, and EISs before and after assignment. The TxDOT reports that it needs more time to compile post-NEPA assignment data. The TxDOT reports that the pre-NEPA assignment median time frame to complete an EA is 1060 days (35.33 months) and 3,351 days (111.7 months) to complete an EIS. The second measure is the median time frame from submittal of biological assessment to receipt of biological opinion. The TxDOT reports that the pre-NEPA Assignment median time frame for completing a biological opinion is 43 days, and 16 days to complete informal consultation. The TxDOT reported a time frame of 65

days for a single biological opinion since NEPA Assignment. The 10 informal consultations since assignment had a median time frame of 28 days (12 days longer).

In interviews, the team learned of several best practices from the TxDOT CE Self-Assessment Report. The TxDOT's QA/QC process generates measures of error rates that provide useful information to improve the overall program management and efficiency. The TxDOT has used performance measures to evaluate the effectiveness of the SAB Feedback Program, and has demonstrated reduced error rates over its limited review time frames. Also, some of the measures closely correlated with follow up training which demonstrated its utility. One individual stated in an interview that the initial rate was initially in the high single digit percentiles (c.f., if CE determinations were signed or not). The team then considered three periods of data corresponding to rough quarter yearly time frames. In the initial quarter, people who made mistakes and were then mentored through a phone call showed a drop in number of errors over time. The same people were, for the most part, no longer making the same errors after the third quarter.

Another practice the team learned about through interviews was that TxDOT had collected and considered many measures of its performance in addition to the ones in the Self-Assessment Report Summary. The team requested more information about these additional measures from TxDOT and has received some details (TxDOT's CE Self-Assessment Report). The team hopes to see more. The team encourages TxDOT to

generate performance measures in addition to the ones reported and to share those measures with the team as part of FHWA's overall review of NEPA assignment.

#### Audit #2 Observation #13

The team continues to be concerned that the measure for the TxDOT relationship with the public may be too limited by focusing on the number of complaints, and urges TxDOT to continue thoughtful consideration of the development of this measure. The team learned through interviews that the CSTAR database is where complaints get recorded and distributed to different parts of TxDOT, but that it apparently was not consulted to compute a baseline measure to use for comparison. Also, public complaints, according to District staff, come into individual District offices which may not be tabulated in CSTAR. The team urges TxDOT to consider the measure of public relationship in more refined detail than agency-wide scale to distinguish concerns that are tied to a particular project and those tied to program management and decisionmaking. The FHWA acknowledges that public comments and complaints were and will continue to be an important consideration in project level decisionmaking. The performance measure for public relationship should address TxDOT's consideration of project specific concerns (not just the number of complaints) and concerns about the environmental program.

### **6. Training Program**

The team recognizes the following successful practices. The team learned of resource sharing within the Houston District of Subject Matter Resource (SMR) staff who serve as

in-house sources of knowledge and expertise. The SMR staff also commit to attend formal training and perform self-study in their resource areas, which allows them to provide training and mentor other staff on subjects within or related to the resource area.

A second best practice described to the team was that TxDOT conducted a survey of its staff in the summer of 2015 to determine needs and issues related to training. The TxDOT provided the survey results, and the team found these data to be both detailed and informative. The TxDOT reported during the pre-Audit #2 that this information was used to identify training needed by ENV staff to professionally develop Division staff and maintain expertise in their respective subject areas. The survey results from District staff identified training needed for District environmental staff to perform job duties. The team looks forward to reviewing TxDOT's progressive training plan and the updated training plan based on the new data.

A third best practice the team learned through interviews is that the TxDOT tool kit (available to consultants, local government staff, and the public) provides training opportunities for documentation and record keeping. When a consultant raises a question or concern in response to a TxDOT document review comment, staff can refer to the tool kit in order to support the TxDOT position. Finally, the ENV Director said in his interview that the tool kits contribute to increased consistency throughout the process (e.g., comments on documents, format, and content), resulting in a more predictable

project development process. That consistency is appreciated across the board in Districts and LPAs.

#### Audit #2 Observation #14

The FHWA recognizes that TxDOT's annual environmental conference is its primary outreach to LPAs and consultants to address a wide array of environmental topics that reinforce existing and new environmental policies and procedures. However, the 2015 conference was not well attended by LPA staff, a fact acknowledged by the Director of ENV in his interview. He also indicated that he was thinking of reaching out to large metropolitan planning organizations and the Association of Texas Metropolitan Planning Organizations in a meaningful way in coordination with TxDOT's training coordinator. The team also learned through interviews that some, especially rural District local government staff, were uninformed of the changes with TxDOT NEPA Assignment. The team encourages the Director of ENV and the training coordinator to implement ways to train local government staff.

#### **Status of Observations since the Last Audit (December 2015)**

##### **Non-Compliant Observations**

Audit #1 identified two non-compliance observations. One was related to the application of a CE action that related to a program that TxDOT did not have. The TxDOT

acknowledges this non-compliance observation and has taken corrective action to prevent future non-compliance. Accordingly, a stand-alone noise wall project using 23 CFR 771.117(c)(6) is no longer a possible selection of CE actions that any TxDOT District can make. The other was an instance where a CE determination was made (called a conditional NEPA approval or “conditional clearance”) before all environmental requirements had been satisfied. Since Audit #1, TxDOT has continued to make NEPA approvals “conditionally,” and those actions have been identified as non-compliant in this report. The TxDOT drafted an update of an SOP to address this issue. The FHWA expects TxDOT to prepare a corrective action so that its program would comply with the MOU. The FHWA will review the corrective action and indicate to TxDOT whether it satisfactorily addresses this concern. Also, FHWA requested that TxDOT take additional steps to prevent any future non-compliance in this regard.

## **Observations**

### **1. Updates to ECOS, the TxDOT File of Record**

The TxDOT ran into further delays in implementing its ECOS upgrade contract. The TxDOT has a plan in place that outlines five phases of work to be performed to upgrade ECOS over many years. Substantive ECOS upgrades are still pending as of the development of this draft report. This is leading to continued observations by FHWA, and inconsistencies within ECOS by TxDOT users. A lack of mandatory filing and naming conventions by ENV contributes to this issue. Of concern to FHWA is the ability for TxDOT users to potentially delete files and approvals in ECOS without an archive of

such actions. This could be problematic as it differs from the FHWA's previous understanding of ECOS security measures in place from Audit #1.

## 2. Addressing Conflicts and Disputes

Since Audit #1, TxDOT has implemented conflict resolution training for its ENV and District staff. This training has been well received and should help prepare staff to recognize when conflicts may occur and to take steps to address issues before they develop into disputes. Interviews conducted for Audit #2 suggest that TxDOT and resource agency staff may need to focus on improving communication in order to foster and nurture relationships.

## 3. Local Public Agency Project Reviews

This observation continues as is. The Local Public Agencies (LPA) were invited to the TxDOT Environmental Coordinators Conference (ECC), but TxDOT ENV confirmed that few LPAs attended. It was further noted by TxDOT that perhaps the ECC may not be the best training venue for LPAs that need more than introductory information or refreshers on NEPA related topics. Furthermore, some rural Districts indicated that they remain Department Delegate on local projects when LPAs can or should be project sponsors, because LPAs in the rural areas are sometimes unaware of what to do to develop their projects. The situation seems to be different in metropolitan areas where LPAs are more sophisticated and can perform well as project sponsors.

#### 4. Recording and Implementing Environmental Commitments

The team continued to find issues with the EPIC sheet and commitments in Audit #2. A total of 21 instances were found where inconsistencies in EPIC reporting were noted. Primarily, there was the fundamental problem of EPICs being required (and sometimes uploaded under the documentation tab) for a project but a notice stating “No EPICs Exist for this project” under the EPIC tab in ECOS was frequently found. The TxDOT has formed an internal team to address this issue.

#### 5. Inadequate Project Description

The TxDOT has begun to address the issue of inadequate project descriptions by providing training on expectations for what should be in a project description in its 2015 environmental conference. The training instructors included individuals from FHWA and TxDOT. The team continued to find project descriptions that were unclear or may not have supported the decisions made in project files. The team suggests that TxDOT apply QA/QC to this issue. The TxDOT acknowledges this is a continuing issue and has indicated that it will continue to address it in NEPA chats and training.

#### 6. Project File Organization and Completeness Issues

The team continued to find outdated terms in project files (e.g., BCE/PCE) and occasional difficulty in finding information in project files with no consistent file labeling protocol or expectations for where to find specific information. For example, resource agency coordination letters were sometimes found as individual documents in a file and other

times they were appended to a NEPA document. The TxDOT indicated that it formed a workgroup in the summer of 2015 that meets to address inconsistencies regarding filing and naming conventions.

#### 7. Public Disclosure of ECOS Project Records

The TxDOT has not taken any actions on this item other than to make information available upon request or at public meetings/hearings for a project.

#### 8. No EAs or EIS Being Reviewed by the SAB Team

The team learned that SAB only performs post decision (QA) reviews and provides feedback to both the Districts directly and the Corrective Action Team at ENV to consider if any process or procedural changes are needed. The FHWA believes there is a function that SAB or others could serve before the decision is made that would add value to the upfront QC process for both document content and procedural compliance. The FHWA understands the expected benefits of Core Team reviews but believes something more is needed and would be helpful to Districts.

#### 9. Sampling Approach for QA/QC

The team learned in Audit #2 that there is a risk-based sampling method applied to choosing projects types that are selected for more detailed reviews, and that the number of staff available for the reviews dictates the number of reviews that are completed. The review sample is based on a computer generated model that chooses some of the projects

randomly. There is no established sampling methodology for self-assessing the effectiveness of TxDOT's standards or guidance. The FHWA would like to see more clarification from TxDOT on the effectiveness of its current practice and be provided data to verify TxDOT claims of compliance.

#### 10. Confusion in Understanding Quality Control, Quality Assurance, and Self-Assessment

Most of the confusion within TxDOT regarding these terms has been cleared up. The FHWA believes that additional internal (QC) review (beyond the Core Team concept for project documentation) for NEPA process related checks by TxDOT before the decisions were made would add value to the process, help ensure NEPA compliance, and assist with FHWA's requirement to make informed and fully compliant project authorization decisions.

#### 11. Narrow Definition of the QA/QC Performance Measure

The team's Observation #11 was that the QA/QC measure for NEPA decisions focused only on EA and EIS projects. The team urges TxDOT to consider evaluating a broader range of NEPA related decisions (including, but not limited to CEs, re-evaluations, Section 4(f), and STIP/Transportation Improvement Program (TIP) consistency). Note that the recurring non-compliance observations occurred on CEs with either STIP/TIP or Section 4(f) items that were not ready for a decision to be made. In recent interviews with TxDOT staff, the team learned that TxDOT will examine other measures on an

ongoing basis for internal use. The team believes that if the QA/QC refocuses attention not only on the documentation, but also on the required sequential NEPA process related items, that improved efficiencies related to TxDOT's NEPA decision and FHWA project authorization could result. The team believes that a more relevant focus on process could potentially help avoid non-compliance actions by TxDOT under the MOU and FHWA non-compliance observations in future audits.

#### 12. Performance Measure Utility

Observation #12 was that the utility of several of the performance measures was difficult to determine. Also, the team was concerned that the measure for the TxDOT relationship with the public may be too limited by focusing on the number of complaints. Through recent interviews, the team learned that TxDOT staff agree with FHWA's concerns about utility. Quantifying changes in relationships with the public or agencies is possible, but the number is hard to interpret. Regarding the survey of agencies, TxDOT staff indicated that they did not know if agencies have higher expectations of TxDOT compared with other agencies. Considering the TxDOT relationship with the public, staff told the team that, during the preparation of their application, they considered various sorts of surveys and social media outreach. Given the cost of these approaches, TxDOT was not convinced of their utility and so decided not to use any of them. This leaves the performance measure difficult to address for TxDOT and may be a recurring FHWA observation until it is resolved.

### 13. TxDOT Reliance on the California Department of Transportation (Caltrans)

#### Training Plan

The team's Observation #13 was that the Caltrans training plan, which served as a basis for the TxDOT training plan, may not adequately meet the needs of TxDOT. The team urged TxDOT to consider other State DOT approaches to training. The TxDOT staff said in a recent interview that they had reviewed training plans from Virginia, Ohio, Alaska, and Florida. They also indicated that prior to Audit #2, TxDOT had completed a survey of staff in District offices and at ENV to assess training needs. The team was told that the surveys would be used to update the training plan in the spring of 2016.

### 14. Adequacy of Training for non-TxDOT Staff

Observation #14 urged TxDOT to assess whether the proposed training approach for non-TxDOT staff (relying heavily upon the annual ECC) is adequate and responsive enough to address a need to quickly disseminate newly developed procedures and policy.

Through interviews, the team learned that TxDOT does not prioritize training classes specifically for non-TxDOT staff. The Director of ENV acknowledged that the training session at the recent ENV conference for LPA staff was not well attended and was thinking of reaching out to large planning organizations. The TxDOT concluded that its priority for training is first for TxDOT staff internally (ENV and District staff), second for consultants that TxDOT hires for environmental work, and third for LPAs. In years three and beyond of the TxDOT NEPA Assignment, the training plan may start to focus on the second, and eventually third, priority groups of individuals.

#### 15. What Training is Mandatory

Observation #15 resulted in a team suggestion that the progressive training plan clearly identify the training required for each job classification. The TxDOT training coordinator told the team that the progressive training plan will address training required to meet State law (16 hours of training) and job task certification. This plan will be developed at the end of 2015.

#### 16. Training Plan, Consideration of Resource Agency Recommendations

The team learned in a recent interview that in the fall of 2015 (as in the fall of 2014), TxDOT subject matter experts planned to reach out to resource agencies to ask what training they would like to see conducted for TxDOT staff. Previously, USACE staff said that TxDOT needed 404 training. The TxDOT scheduled and completed Section 404 training in two different locations during October 2015. The TxDOT will continue to schedule Section 404 training.

#### **Next Steps**

The FHWA provided this draft audit report to TxDOT for a 14-day review and comment period. The team has considered TxDOT comments in developing this draft audit report. As the next step, FHWA will publish a notice in the Federal Register to make it available to the public and for a 30-day comment period review (23 U.S.C. 327(g)). No later than 60 days after the close of the comment period, FHWA will respond to all comments

submitted in finalizing this draft audit report, pursuant to 23 U.S.C. 327(g)(B). Once finalized, the audit report will be published in the Federal Register.

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